VERMONT LABOR RELATIONS BOARD

PETITION OF VSEA FOR APPOINTMENT )
OF FACT-FINDING PANEL ) DOCKET NO. 82-13

MEMORANDUM AND ORDER
APPOINTING FACT-FINDING PANEL

On April 14, 1982, the Vermont State Employees' Association ("VSEA") petitioned the Vermont Labor Relations Board for appointment of a fact-finding panel to assist VSEA and the State of Vermont ("State") in resolving an impasse in a bargaining dispute during the term of the collective bargaining agreement concerning the impact of proposed schedule changes for certain employees of the Vermont State Hospital.

VSEA's petition for appointment of a fact-finding panel was filed subsequent to the failure of mediation to resolve the parties' differences. The parties reached impasse in negotiations in late February, 1982, and VSEA petitioned the Board for appointment of a mediator. Federal Mediator Ira Lobel was called in, but was unable to bring the parties to settlement.

The State opposes VSEA's petition for appointment of a fact-finding panel. The State contends the provisions of the State Employees Labor Relations Act (SELRA) do not contemplate access to the statutory fact-finding process for the resolution of mid-term bargaining issues, and the Board is without jurisdiction to appoint a fact-finding panel. The parties filed memoranda of law in support of their respective positions on May 10, 1982.

In two prior decisions, VSEA v. State of Vermont, 2 VLRB 26 (1979), and VSEA v. State of Vermont, 2 VLRB 155 (1979), we held the State, absent a waiver by either the terms of the agreement or by actual negotiation, has a duty to bargain changes in mandatory subjects during the term of an agreement. We further held work schedules constitute working conditions which are mandatory bargaining subjects under 3 VSA §904(a)(3).

Even without applying the principles of those cases we would reach the same result. The parties have provided for bargaining during the term of the contract concerning work schedule changes in the collective bargaining agreement applicable to this case (Agreement between the State and VSEA, effective July 1, 1981 - June 30, 1982). Article XVIII(2) of the Agreement provides:

> New Shifts - In any department or institution, prior to establishment of a new shift (a shift with starting and quitting times different from any existing shift) or a new workweek (a combination of workdays constituting 40 hours which is different from any existing combination of workdays, or which includes evenings or half-days), the appointing authority shall notify the Association and shall negotiate the impact of that decision to the extent required by law.

The State contends they have negotiated on the impact of schedule changes at the Vermont State Hospital to the extent required by law; that SELRA does not contemplate access to the statutory impasse resolution procedures in the event of impasse in negotiations concerning mid-term bargaining items. VSEA maintains the parties must use the impasse resolution procedure to resolve the dispute.

SELRA's statutory impasse resolution provisions are found in 3 VSA §925. §925(a) provides:

> Whenever the representatives of a collective bargaining unit and the representative of the employer, after a reasonable period of negotiation reach an impasse during the course of collective bargaining on subjects defined in Section 904 of this title, the board, upon petition of either or both parties, may authorize the parties to submit their differences to mediation.

If mediation fails, the Board appoints a fact-finding panel. 3 VSA §925(b). If fact-finding does not resolve the impasse, the Board selects between the last best offers of the parties, and recommends its choice to the general assembly as the bargaining agreement which shall become effective subject to appropriations by the general assembly. Nothing precludes the general assembly from enacting laws amending provisions of any agreement arrived at under this section. §925(1).

We believe the Legislature intended the impasse resolution procedures to apply to bargaining disputes arising during the term of an agreement where a duty to bargain exists; that is, where the parties have not waived their right to bargain on a mandatory subject. 3 VSA §925(a) provides the impasse resolution procedures are applicable when an impasse is reached "during the course of collective bargaining" on mandatory subjects. Collective bargaining is not limited to the Master Agreement negotiated by the parties. 3 VSA §902(2) defines collective bargaining as "the process of negotiating terms, tenure or conditions of employment... with the intent to arrive at an agreement which, when reached, shall be reduced to writing." Parties, when negotiating mid-term mandatory bargaining subjects, are intending to arrive at a written agreement.

Our interpretation of the statute is consistent with the stated policy of SELRA to:

> ...prescribe the legitimate rights of both state employees and the State of Vermont...in their relations with each other, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, ...to define and proscribe practices...which are harmful to the general welfare, and to protect the rights of the public in connection with labor disputes.

To this end, the Legislature took away the strike as an economic weapon of State employees, 3 VSA §902(b), and, in its place, substituted impasse resolution procedures. The Legislature has opted for a peaceful and reasoned, although often-times lengthy, approach to resolve bargaining disputes rather than a potentially-disruptive approach emphasizing the respective powers of the parties. Without resort to the impasse resolution procedures over mid-term bargaining disputes, State employees would be left without meaningful collective bargaining rights in regard to such disputes. Employees would have neither the strike weapon nor threat of an imposed settlement to induce the State to bargain meaningfully. We believe to interpret SELRA as the State asks would be contrary to the intent of the Legislature.

Here, VSEA has negotiated away its ability to bargain over the decision to change work schedules of Vermont State Hospital employees, but it has retained the right to bargain over the impact of that decision "to the extent required by law". This is a mandatory bargaining subject since work schedules themselves are working conditions, and any decision to change them will clearly impact on working conditions of employees. 3 VSA §904(a)(3). Accordingly, the present impasse is an appropriate one to invoke statutory impasse resolution procedures.

The State maintains that even if the statutory impasse resolution procedures are determined applicable to the present dispute, the Board should allow the State to implement changes in the work schedules at the

Hospital while the impasse resolution process goes forward. The State's argument is two-pronged. First, the State maintains it may implement because the parties have reached impasse. Second, the resort to statutory procedures may result in submission of recommendations to the Legislature, and the Legislature will not be in session until January, 1983. If it is forced to delay implementation until the Legislature acts, the State maintains the increased costs associated with running the Hospital in the first six months of FY 1983 without the proposed schedule changes would seriously jeopardize the ability of Hospital management to fulfill its statutory duties within its appropriation.

The State's first argument ignores the bargain that the parties have made. In Article XVIII(2) of the Agreement, the parties have provided the parties shall negotiate the impact of shift changes prior to establishment of a new shift to the extent required by law. This means the State may not implement until the completion of mandated statutory impasse procedures.

Also, an "impasse" in the public sector, unlike the private sector, does not mean the parties have reached a deadlock; that they have irreconcilliable differences. Under SELRA, declaration of impasse simply means a determination by either or both parties to use statutory dispute resolution procedures. It merely represents a realization that third-party assistance is needed to continue productive bargaining, and it is not appropriate for management to make unilateral changes in conditions of employment prior to exhausting the mandated statutory impasse procedures. A genuine deadlock has not been reached. c.f. Chester Education Association, 1 VLRB 426 (1978). Burlington Firefighters Association v. City of Burlington, 4 VLRB 379 (1981).

The second State argument states a financial need to implement the work schedule changes. The New York Public Employment Relations Board has held a public employer may take unilateral action where 1) negotiations are deadlocked, 2) there are compelling reasons for the employer to act unilaterally at the time it does so, and 3) the public employer is willing to continue to negotiate the matter after making the unilateral change. Deer Park Union Free School District, 14 PERB 3028 (1981). Hilton Central School District, 14 PERB 3038 (1981). Here, however, there is no need to adopt such a test. The Vermont Legislature has recognized the need for government to function efficiently, and has established a procedure which allows the State to implement a unilateral change in conditions of employment in situations like the one before us. 3 VSA §982(f) provides:

> In the event the employer and the collective bargaining unit are unable to arrive at an agreement and there is not an existing agreement in effect, the secretary of administration, with the approval of the governor, may make such temporary rules and regulations as may be necessary to ensure the uninterrupted and efficient conduct of state business. Such rules and regulations shall terminate and be of no further force and effect, except for any rights arising thereunder, as soon as an agreement is reached.

We believe this procedure applies here since the parties may be unable to arrive at an agreement concerning the impact of the work schedule changes, and there is no agreement in effect on it. 3 VSA §982(f) would take effect when the parties have "negotiated to the extent required by law". Negotiations would effectively end once the Board has issued its recommendation on the last best offers submitted by the parties pursuant to 3 VSA §925(i). Up to that time, the inevitable compromises and shifts of position indicative of true negotiations occurs. If the Board

issues its recommendation and the parties still have differences, they have reached deadlock. Then the secretary of administration may take unilateral action pursuant to §982(f), the effect of such action terminating when the Legislature acts on the Board's recommendation.

The final issue raised by the State is that the Board is obliged to follow the statutory procedure and appoint a mediator before proceeding to fact-finding. We disagree. The statutory procedure has been complied with. VSEA petitioned the Board to appoint a mediator in early March, 1982. The Board asked the Federal Mediation and Conciliation Service to appoint a mediator. They acceded to our request by appointing Ira Lobel who was unable to mediate a settlement.

Now, therefore, based on the foregoing reasons, it is hereby ORDERED:

> The State of Vermont and the Vermont State Employees' Association having reached impasse in negotiations during the term of the collective bargaining agreement concerning the impact of proposed schedule changes for certain employees of the Vermont State Hospital, and mediation having failed to resolve the parties' differences, and the Vermont State Employees' Association having requested the appointment of a fact-finding panel, a fact-finding panel is appointed pursuant to 3 VSA §925(b).

Dated this 27th day of May, 1982, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson